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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 752

JOHN A. GUZIAK, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, John A. Guziak, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on June 24, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the hearing officer and the Federal Trade Commission is printed in the copies of the record filed in the Court below and nine copies thereof filed herein. The opinion of the Circuit Court of Appeals, printed in Appendix B, *infra*, p. 11a to p. 18a has been reported in 361 F. 2d 700 (1966).

DATE OF JUDGMENT

The opinion of the Court was dated June 8, 1966 and the final decree affirming and enforcing the order to cease and desist was entered June 24, 1966.

EXTENSION OF TIME TO FILE PETITION

On September 6, 1966, this Court extended the time in which to file a petition for a Writ of Certiorari to and including November 5, 1966.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

Did the Court of Appeals conflict with the decisions of this Court; and depart from and allow the Respondent to depart from accepted and usual courses of judicial proceedings in holding:

(1) The Petitioner was engaged in commerce and only a single act is necessary, and this need not be in commerce, to allow jurisdiction.

(2) The Respondent has broad discretion to determine public interest and jurisdiction and this should not be reviewed or questioned.

(3) By not reviewing the findings of unlawful acts to determine if supported by the evidence, and ordering the enforcement of an order without determining if the order had a reasonable relation to any unlawful practices proved.

(4) By allowing the Respondent to disregard corporate entities; to improperly coach witnesses; to improperly use confidential reports; and not safeguard petitioner from improper practices.

STATUTES INVOLVED

Sections 44 and 45 of the Federal Trade Commission Act, U.S.C., § 45, 46, is printed in Appendix A, *infra*, p. 1a.

STATEMENT

This proceeding was commenced by the Respondent, Federal Trade Commission, issuing a complaint on January 30, 1964, charging the Petitioner, John A. Guziak, an individual, and as trading as General Aluminum Company, a corporation, and as Superior Improvement Company, a corporation, with unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Sections 44 and 45 of the Federal Trade Commission Act, (15 U.S.C. § 44, 45) by making false and deceptive statements and representations in the sale of aluminum and simulated stone siding materials in interstate commerce.

The Petitioner denied jurisdiction of the Respondent and any wrongdoing.

Hearings were held by a Hearing Examiner of the Respondent in this matter on September 15, 16, and

17, 1964 in Little Rock, Arkansas, September 21 and 22, 1964 at Nashville, Tennessee, and on September 25, 1964 at Hopkinsville, Kentucky, at which testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. At the conclusion of the hearings on September 25, 1964, the record was closed and in due course both parties filed proposed findings of fact, conclusions of law and briefs in support thereof. The Hearing Examiner made findings of fact, conclusions and order, from which Petitioner appealed to the Commissioner.

On December 24, 1964, the Hearing Examiner for the Respondent made findings of fact, conclusions and prepared an order favorable to the Respondent. On appeal to the Respondent, the Respondent generally approved the findings of its Hearing Examiner and the order, however, modifying the language of the order, on June 28, 1965.

The order of the Respondent was appealed to the Circuit Court and was affirmed. The opinion of the Circuit Court affirming the Respondent was filed June 8, 1966. (Appendix B, *infra,* p. 11a) On June 24, 1966, a final decree affirming and enforcing the Respondents order was entered by the Circuit Court (Appendix B, *infra,* p. 19a).

ARGUMENT

The decision of the Court of Appeals conflicted with the decisions of this Court, and was such a departure from accepted and usual course of judicial procedure to warrant the granting of a Writ of Certiorari because of the following:

1. The Respondent, Federal Trade Commission, did not have jurisdiction.

The Commission and the Circuit Court erred in concluding that the Federal Trade Commission has jurisdiction of the Petitioner. The Hearing Examiner held that the Petitioner is, or had been during the times material to the complaint, engaged in commerce within the meaning of the Constitution and the Federal Trade Commission Act.

The facts he relied upon were that (1) Respondent sold three or four customers in Kentucky, (2) Respondent mailed brochures which Hearing Examiner states were a vital part of the business; and (3) Respondent placed advertisements of siding material in publications with interstate circulation.

The Petitioner devoted much of his brief, reply brief and oral argument discussing these facts. Only some of this argument is quoted as follows:

> "In addition, Examiner's finding has not been substantiated by the record. This finding is supposedly based on an alternative approach of,
>
> (1) Three sales in Kentucky in 1961;
>
> (2) Use of mails to solicit business; and
>
> (3) One newspaper ad (R. 87).
>
> As stated, *supra,* the three sales speak for themselves as remoteness, further they were not made by petitioner or authorized by him (R. 18, 46).

As to the use of mails, this was not interstate commerce, because the mailings were not from citizens of one state to another, as the recipients were residents of the same state as the corporation doing the mailing and also of petitioner (Pet. Br. 6, Tr. 604, R. 44, 18, 45). Furthermore, petitioner is no longer using the mails in any regard (R. 16, Tr. 28). Also, the Examiner found that petitioner contacted his customers in three other ways besides use of the mails, even when using the mails (R. 55).

As to the one newspaper ad, this was not authorized nor ratified, nor was it run for the purpose of securing out of state business (R. 44). There is no finding or any evidence to support one that the ad was run to secure interstate business (Pet. Br. 11-13; R. 44; Tr. 599; Tr. 84, 85, 86), or as a result of the ad interstate sales were made (R. 44, 19; Tr. 83-85). Even the Commission has held that the purpose of the newspaper ad must be to secure sales from out-of-state customers, F.T.C. Docket No. 7039, CCH Trade Reg. Rep., para. 830.05, affirmed on other grounds, Banker's Securities Corp. v. F. T. C. (C.A. 3; 1961), 297 Fed. 2d 403."

The Circuit Court was either not aware of this argument regarding this alleged interstate activity or completely ignored it because it held:

"With this as his premise, petitioner reasons that the Commission had no jurisdiction over the matter involved herein as the record reflects interstate activity only to the following extent: (1) Three sales in Kentucky in 1961; (2) use of the mails to solicit business; and (3) one newspaper advertisement. *The petitioner further contends that there has been no showing that any wrong-doing actually occurred during the conduct of this limited interstate activity.* (Emphasis supplied)

The Circuit Court, if it had been exercising proper review, would have been aware of the argument and would not have assumed this "limited interstate activity", and would have ruled on the extended argument advanced by Petitioner denying even the three alleged activities.

The Circuit Court then follows this erroneous assumption of facts by stating a single act is sufficient to grant jurisdiction to the commission and states:

> "When Section 5 of the Federal Trade Commission Act was amended in 1938 to extend the Act's coverage to consumers as well as competitors, the Senate Committee involved expressed its opinion concerning the jurisdiction of the Commission by stating that 'since the powers of the Commission in this respect are injunctive rather than punitive, the Commission should have the power to restrain an unfair act before it had become a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple or continuing effects and may be far reaching' S. Rep. No. 221, 75th Cong., 1st Sess., 3-4 (1937). This Committee's declaration was the basis for the conclusion that 'the Commission's jurisdiction is not intended to be affected even if only a single unfair act is involved.' Gellman v. FTC, 390 F. 2d 666, 670 (8th Cir. 1961) (dictum).

The Circuit Court not only held a single act is sufficient, it stated the single act did not have to be unlawful. The Court further stated, however, "Contrary to the petitioner's assertion, the evidence supports the Commission's finding that unfair and deceptive methods were employed during the course of these interstate activities." This was in complete error. Neither the Commission nor the Examiner found there

was any wrongdoing in interstate commerce of even a single act. Neither the Examiner nor the Commission found, nor was there any proof, that Petitioner in commerce made any statement that constituted misrepresentation. The Examiner found that Petitioner is, or has been engaged in commerce (R. 90) and found that at times petitioner made statements that were found to be misleading (R. 86), but nowhere did he make any finding that any particular misrepresentations had been made in commerce, nor at the time he engaged in commerce, petitioner committed any prohibited act.

The only practices with which the Commission may concern itself are transactions in interstate commerce, and does not have jurisdiction in matters that only affect intrastate commerce. *Bunte Bros.* v. *Federal Trade Commission,* 110 F. 2d 412, affirmed 61 S. Ct. 580, 312 U.S. 349 (1941). Any right of action under the Act can be based only on practices taking place in interstate commerce. *Samson Crane Co.* v. *Union National Sales,* 87 F. Supp. 218, affirmed 180 F. 2d 896 (1st Cir. 1950). The Commission has no authority over purely intrastate sales. *Shafe* v. *Federal Trade Commission* (6th Cir. 1958), 256 F. 2d 661. On this point, the court, in *Federal Trade Commission* v. *Claire Furnace Co.,* 285 Fed. 936, reversed on other grounds 47 S. Ct. 553, 274 U.S. 160 (1927), stated:

> "The powers of the Commission are limited to matters directly relevant to interstate commerce, but the subject under investigation must be related to interstate commerce that its regulation may be accomplished by act of Congress. * * *"

This Court has never held a single act, even if unlawful, is sufficient to grant jurisdiction. In *Inter-*

national Textbook Co. v. *Pigg,* 217 U.S. 91, 107 (1910), a correspondence school was teaching through the mails students in other states several courses of study. In addition, they furnished these students with school books and other products. This was, as this Court stated, ". . . regular and practically continuous intercourse between the textbook company, located in Pennsylvania, and its scholars and agents in Kansas and other states." Certainly this is different from a situation where there is a single act. To hold that a single act, and it not unlawful, is clearly in conflict with the Federal Trade Act and the prior holdings of this Court.

2. The Circuit Court should have reviewed the question of Public Interest.

The Petitioner contended that this proceeding should have been dismissed because it was not in the public interest and argued in part as follows:

> "The Hearing Examiner erred in holding this proceeding was in the public interest. The fact that the counsel supporting the complaint, with all its outside help, was only able to produce a small number of witnesses—32 out of approximately 1,000 sales—is proof of that. The courts have always held any misrepresentations must be specific and substantiated and the proceeding must be in the interest of the public. *Federal Trade Commission* v. *Raladam Co.*, 51 S. Ct. 587, 283 U.S. 643, 79 A. L. R. 1191, motion denied 53 S. Ct. 14, 284 U.S. 572. See also, *Federal Trade Commission* v. *Royal Milling Co.*, 53 S. Ct. 335, 288 U.S. 212; *Ostler Candy Co.* v. *Federal Trade Commission,* et al., 106 F. 2d 962, certiorari denied 60 S. Ct. 713, 309 U.S. 675; *Federal Trade Commission* v. *Mid West Mills,* 90 F. 2d 723; *John Bene & Sons, Inc.* v. *Federal Trade Commission,* 299 Fed. 468; *Raladam Co.* v. *Federal Trade Commis-*

sion, 123 F. 2d 34, reversed on other grounds 62 S. Ct. 966, 316 U.S. 149.

The Circuit Court replied to this argument as follows:

> "In considering the assertion of jurisdiction in this instance, it must be remembered that the Commission has broad discretion in determining whether a proceeding brought by it is in the public interest and that each case must be determined upon its own facts."

In other words, the Circuit Court, on the matter of public interest, is not to go beyond the discretion of the Commission.

This is in direct conflict with this Court's holding in *American Airlines* v. *North American Airlines,* 351 U.S. 79, 83 (1956), where this Court held the public interest must be "specific and substantial" and is subject to judicial review. Here the Circuit Court refused even to review or even discuss the question other than to say it should be left to the discretion of the Commission.

3. The Court should have reviewed the findings to determine if supported by the evidence, and should have reviewed the order to determine if it had a reasonable relation to any unlawful practices proved.

The Petitioner substantiated in his brief specific instances where findings of the Respondent were not supported by substantial evidence, in some instances by no evidence at all and in other instances in direct conflict with the only evidence presented on that point. The Court's answer to this was as follows:

> "The petitioner further urges that the Commission made findings of facts which are not supported by

> the weight of the evidence and which are, in many instances, contrary to the evidence. It is not the function of the Court to try this matter de novo. Rather, it is for the Commission to weigh the evidence, appraise the credibility of witnesses, resolve conflicts in evidence and draw conclusions from what it considers the most convincing evidence. Benrus Watch Co. v. FTC, 352 F. 2d 313, 317 (8th Cir. 1965). Findings that are supported by substantial evidence are conclusive and binding upon this Court."

It is true that findings supported by substantial evidence are binding. However, the Circuit Court should not use this rule as a reason not to review the findings, particularly when it enters an order enforcing the findings, and in view of the fact that this is the only opportunity an adversary of Respondent has to have the facts examined by one other than an employee of the Respondent.

The Circuit Court, by its own general statements, reflects it did not examine the evidence to see if the findings were supported by substantial evidence. One such general comment was as follows:

> "Furthermore, the mere fact that some of the findings of fact were in conflict with petitioner's testimony does not render them erroneous. The findings of fact in this case were supported by substantial evidence. Such findings are therefore conclusive and binding upon this Court."

Even this general statement is not correct. Where Petitioner's testimony was the only evidence, on any point, the Examiner was not justified in finding to the contrary.

With reference to the order this, except for one enlargement by the Commission, was prepared prior to

any evidence being taken. As a result it prohibits acts which the Respondent had hoped to prove were unlawful and had been committed. In some instances, these acts were not proved to have been committed or, if committed, were not unlawful. The enlargement by the Commission amounted to items not in the complaint. The Petitioner devoted much of its argument in his brief to these inconsistencies and the over broadness of the order. The Circuit Court again refused to review the evidence or the order but dismissed the contention with the general statement that it was reasonably related. It is respectfully submitted that, in view of *Federal Trade Commission* v. *Henry Broch & Company,* 368 U.S. 360 (1962) it should have reviewed the order in view of the evidence.

4. The Circuit Court should have required the Respondent to have followed accepted legal procedure.

Petitioner argued before the Circuit Court that proper legal procedure was not followed with reference to use of confidential investigative reports, coaching of witnesses and corporate entities.

With reference to the use of the investigative report, when this was first used the first day in Little Rock, the Examiner ruled it was not proper to use the report and admonished the attorney for the Commission not to use it again. Later, in Nashville, when it became obvious that it was being used to refresh the memory of the witnesses, the Examiner discounted the testimony of four witnesses, when counsel for the Commission stipulated the four witnesses called that day had seen the report. However, the Examiner refused to go beyond the witnesses called that day.

Before the Court of Appeals, Respondent brazenly argued that there was no evidence in the record any witnesses had seen the report. Petitioner argued as follows:

> "Respondent claims there is no evidence in the record that '* * * it was learned' witnesses had been shown copies of the investigative report (Br. 20). A part of this is as follows:
>
> 'Mr. Puckett: Well I will stipulate they were shown portions of the report . . . (Tr. 451).
>
> 'Mr. Pucket: It was exhibited or laid on the table. They had an opportunity to see it . . . (Tr. 452).
>
> Hearing Examiner Jackson: That is the stipulation (Tr. 452).'
>
> As can be seen, it was stipulated the four witnesses called that day had been shown the report, the Examiner wrongfully refused to allow previous witnesses to be called to determine if they had been shown the report after counsel's practice was discovered.
>
> His statement was '* * * But we can't recall those that were here yesterday, or back in Little Rock' (Tr. 451). Also, the Examiner refused to allow the Counsel for the Commission to be called as a witness for the purpose of discovering from him under oath to whom he had shown the report. The Examiner stated (Tr. 447) '* * * Mr. Puckett can not testify here. * * *' And he also stated, '* * * An attorney in a case can't become a witness.' It is submitted that the Examiner should have excluded the testimony of the four witnesses known to have seen the report *and he should have assisted in determining, or at least have allowed a determination, of what other witnesses had been shown the report, after the use of the report had been discovered.*" (Emphasis supplied)

The Circuit Court reacted to this argument by stating:

> "The petitioner also alleges that the hearing examiner erred in not recalling certain witnesses to the stand after it was learned that they had been shown investigative reports prior to testifying. However, both the Commission and the hearing examiner indicated that little, if any, weight was given to the testimony of these witnesses and that their conclusions were reached primarily from the testimony of other witnesses. This being so, the Court finds that the petitioner was not prejudiced by the examiner's failure to recall these witnesses."

The Circuit Court either missed, ignored or did not understand Petitioner's contention regarding determining what witnesses other than the four had been shown the report. The Petitioner was entitled to a ruling on whether the Examiner had acted fairly and properly with reference to the witnesses other than the four called that date. In this omission the Circuit Court ignored and was in conflict with the rule that Petitioner was entitled to a fair hearing. See *Federal Trade Commission* v. *Carter Products, Inc.*, 201 F. 2d 446, 346 U.S. 327. The Circuit Court should have at least ruled whether, after discovery that witnesses were being shown the report the Examiner should have sought or allowed Petitioner to discover what other previous witnesses had seen the report.

With reference to improperly coaching witnesses the Circuit Court mentioned in its footnote that the allegation had been made but nothing had been presented to substantiate that claim. The following is only a portion of the argument and substantiation in

this regard presented to the Court. This was in Petitioner's reply brief as follows:

> "Respondent states that only three witnesses testified that they were shown copies of the complaint (Br. 33). Two of these referred to witnesses stated the complaint had been marked with an "X" to show the misrepresentation alleged (R. 25, 41). He did not refer to the testimony of Mrs. Glass, who took the marked copy of the complaint to the stand (R. 43), to refresh her memory as she testified.
>
> Mr. Puckett readily admitted showing the complaint, and particularly the part that contained the so-called misrepresentations to the witness. In fact, he stated to the Commission that he furnished a marked complaint, as well as the investigator's report, to the witnesses. He stated, '* * * The facts with reference to these interviews and with reference to showing these reports, the complaint, paragraph four of the complaint which refers to, which I marked and let some of these people read, because some of them had not been interviewed for over two years * * *' (Tr. 38, Commission Hearing).
>
> Further evidence that the complaint and proposed order attached was shown to all the witnesses prior to their testimony can be found from this testimony of one of the witnesses who stated (Tr. 191):
>
> '. . . Q. Did you read the complaint?
>
> A. Part of it, yes.
>
> Q. Did he tell you certain parts he wanted you to read?
>
> A. Well, we did read certain lines, yes.
>
> Q. Who did?
>
> A. The folks that was in here.'

> As stated by respondent, it is not improper for trial counsel to discuss with his own witnesses the subject matter (Br. 33) but certainly it is improper to refresh their memory with investigator reports, allegations of wrongdoing in the complaint, and a copy of the order to cease or desist, and, it was improper for the Examiner to treat this coached testimony as frank, reliable and credible (R. 81)."

Surely this is substantial enough presentation to warrant the Circuit Court's surveillance.

With reference to the corporate entities, the Petitioner argued that the Examiner should have recognized, at least as to rules of evidence, the distinction between the Petitioner as an individual and the two corporations involved and further the corporations should have been a party to the proceeding. On this point, the Court relied on cases where the corporations had been parties to the proceedings.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Federal Trade Commission Act, § 44, 45 (15 U.S.C. 44, 45)

§ 44. Definitions.

The words defined in this section shall have the following meaning when found in sections 41-46 and 47-58 of this title, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" includes all documents, papers, correspondence, books of account, and financial and corporate records.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce", approved February 14, 1887 [1] and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints

[1] So in original. Probably should read "February 4, 1887".

and monopolies", approved July 2, 1890; also section 73-77, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'", approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914. (Sept. 26, 1914, ch. 311, § 4, 38 Stat. 719; Mar. 21, 1938, ch. 49, § 2, 52 Stat. 111.)

§ 45. Unfair methods of competition unlawful; prevention by Commission.

(a) Declaration of unlawfulness; power to prohibit unfair practices.

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of

competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Proceeding by Commission; modifying and setting aside orders.

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-54 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for

review has been filed within such time, then until the record in the proceeding has been filed in a court of appeals of the United States as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditons of fact or of law have so changed as to requre such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Review or order; rehearing.

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing

of the petition the court shall have jurisdiction of the proceeding and of the question determining therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

(d) Jurisdiction of court.

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Precedence of proceedings; exemption from liability.

Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return.

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, orders or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order.

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the

extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) Same; order modified or set aside by Supreme Court.

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) Same; order modified or set aside by Court of Appeals.

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate

of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Same; rehearing upon order or remand.

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) Definition of mandate.

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order.

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect

to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. (Sept. 26, 1914, ch. 311, § 5, 38 Stat. 719; Feb. 13, 1925, ch. 229, § 2, 43 Stat. 939; Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111; June 23, 1938, ch. 601, § 1107(f), 52 Stat. 1028; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Mar. 16, 1950, ch. 61, § 4(c), 64 Stat. 21; July 14, 1952, ch. 745, § 2, 66 Stat. 632; Aug. 23, 1958, Pub. L. 85-726, title XIV, § 1411, 72 Stat. 809; Aug. 28, 1958, Pub. L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub. L. 85-909, § 3, 72 Stat. 1750; June 11, 1960, Pub. L. 86-507, § 1(13), 74 Stat. 200)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18,128

JOHN A. GUZIAK, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition for Review of an Order of the Federal Trade Commission.

[June 8, 1966.]

Before VOGEL, Chief Judge, BLACKMUN, Circuit Judge, and STEPHENSON, District Judge.

STEPHENSON, District Judge.

The petitioner herein is seeking review of an order to cease and desist which was issued by the Federal Trade Commission at the close of an administrative proceeding. The case was initiated by the filing of an administrative complaint charging that petitioner John A. Guziak through the instrumentalities of two corporations, General Aluminum Company,[1] a Tennessee Corporation, and Superior Improvement Company, an Arkansas Corporation, is and has engaged in unfair methods of competition and unfair and deceptive acts and practices in interstate commerce in violation of the Federal Trade Commission Act.[2] After conducting several hearings, the hearing

[1] The petitioner herein testified that this corporation is no longer in operation even though it has not been dissolved.

[2] The pertinent provisions of the Act are as follows: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." 15 U.S.C. 45(a)(1) (1964).

"The Commission is empowered and directed to prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 15 U.S.C. 45(a)(6) (1964).

examiner determined that the charges contained in the complaint had been sustained and, accordingly, issued an order directing that Guziak, individually or through any agent, representative or other instrumentality, cease and desist from engaging in any activity specified in the administrative complaint. The petitioner then appealed to the Federal Trade Commission, respondent herein. After considering the case on briefs and oral argument, the Commission filed a separate opinion in which it adopted the findings and conclusions of the examiner and, with some modification,[3] the examiner's order.

The activities giving rise to the administrative complaint occurred during the course of petitioner's business of advertising and selling aluminum siding materials to the public.

The petitioner commenced his operations in the latter part of 1960 by organizing the General Aluminum Company. This corporation operated primarily in Tennessee until the latter part of 1962 when the petitioner transferred his operations to Arkansas where he formed the Superior Improvement Company which now maintains an office and warehouse in Little Rock, Arkansas. Petitioner is the president and sole stockholder of these corporations and is responsible for directing and controlling their activities. The administrative complaint filed in this matter charged that the petitioner, in conducting his business, made false and deceptive representations which tended to mislead individuals into purchasing his product. In asking this Court to set aside the Commission's order requiring him to cease and desist from engaging in the false and deceptive practices set forth in the complaint, the petitioner urges several contentions.

[3] The Commission's modification of the examiner's order is one of the points relied upon by the petitioner as a basis for setting aside the Commission's order and will be discussed.

The petitioner first contends that the Commission erred in concluding that it had jurisdiction over the respondent in this matter since the record does not contain substantial evidence establishing that he is engaged in interstate commerce. While it is true that the jurisdiction of the Commission extends only to transactions in interstate commerce, *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941), the petitioner is urging that the interstate activity must be of some magnitude[4] and that the wrong-doing charged must actually occur in the course of interstate commerce before the Commission may assert jurisdiction. With this as his premise, petitioner reasons that the Commission had no jurisdiction over the matter involved herein as the record reflects interstate activity only to the following extent: (1) Three sales in Kentucky in 1961; (2) use of the mails to solicit business; and (3) one newspaper advertisement. The petitioner further contends that there has been no showing that any wrong-doing actually occurred during the conduct of this limited interstate activity.

When Section 5 of the Federal Trade Commission Act was amended in 1938 to extend the Act's coverage to consumers as well as competitors,[5] the Senate Committee involved expressed its opinion concerning the jurisdiction of the Commission by stating that "since the powers of the Commission in this respect are injunctive rather than

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[4] In his brief, the petitioner places great emphasis upon the fact that, as compared to his interstate activity, the cases relied upon by the hearing examiner in asserting jurisdiction involved interstate commerce of far greater magnitude. While this may be true, it does not necessarily follow that a similar magnitude of interstate activity on the part of the petitioner was a prerequisite to the assertion of jurisdiction in this case. The determination must be made from an interpretation of the Federal Trade Commission Act.

[5] This amendment was briefly discussed in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

punitive, the Commission should have the power to restrain an unfair act before it had become a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple or continuing effects and may be far reaching." S. Rep. No. 221, 75th Cong., 1st Sess., 3-4 (1937). This Committee's declaration was the basis for the conclusion that "the Commission's jurisdiction is not intended to be affected even if only a single unfair act is involved." *Gellman* v. *FTC*, 290 F.2d 666, 670 (8th Cir. 1961) (dictum). There appears to be no basis in terms of either history or logic for holding that the Commission may not assert its power until the interstate activity under scrutiny has reached a certain magnitude. In fact, one of the objects of the Federal Trade Commission Act was to prevent potential injury by stopping unfair methods of competition in their incipiency. *FTC* v. *Raladam Co.*, 316 U.S. 149 (1942); *Fashion Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 466 (1941).

In considering the assertion of jurisdiction in this instance, it must be remembered that the Commission has broad discretion in determining whether a proceeding brought by it is in the public interest and that each case must be determined upon its own facts. *Federal Trade Comm'n* v. *Rhodes Pharmacal Co.*, 191 F.2d 744 (7th Cir. 1951); *Ford Motor Co.* v. *FTC*, 120 F.2d 175, 182 (6th Cir. 1941). It is clear that the petitioner's business activities included sales in Tennessee, Arkansas and Kentucky; an advertisement placed in a newspaper with an interstate circulation; and the mailing of brochures from Wisconsin to individuals in Kentucky, Arkansas and Tennessee. Contrary to the petitioner's assertion, the evidence supports the Commission's finding that unfair and deceptive methods were employed during the course of these interstate activities. Since the prohibition of such activities in the future is in the public interest, the Commission's assertion

of jurisdiction was within its discretion.[6] There is no basis for holding that the Commission did not have jurisdiction over the petitioner in this cause of action.

The petitioner further urges that the Commission made findings of facts which are not supported by the weight of the evidence and which are, in many instances, contrary to the evidence. It is not the function of the Court to try this matter de novo. Rather, it is for the Commission to weigh the evidence, appraise the credibility of witnesses, resolve conflicts in evidence and draw conclusions from what it considers the most convincing evidence. *Benrus Watch Co.* v. *FTC,* 352 F.2d 313, 317 (8th Cir. 1965). Findings that are supported by substantial evidence are conclusive and binding upon this Court.

In attacking the findings, the petitioner has relied heavily upon his own testimony and the fact that many of the findings were based upon activities of the corporations rather than upon his personal activities. These contentions are not convincing. As the motivating and controlling force behind the corporations, the petitioner was responsible for their activities.

The Commission was fully justified in finding the petitioner responsible for the corporate activities and in enjoining him from engaging in similar activities in the future. *Cf. Benrus Watch Co.* v. *FTC, supra* at 324-25; *FTC* v. *Standard Educ. Society,* 302 U.S. 112, 119-20 (1937). Furthermore, the mere fact that some of the findings of fact were in conflict with petitioner's testimony does not render them erroneous. The findings of fact in this case were supported by substantial evidence. Such

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[6] The mere fact that the petitioner is no longer engaged in some, if not all, of the activities which were the basis for the Commission's action does not prevent the issuance of a cease and desist order against such activities. *Automobile Owners Safety Ins. Co.* v. *FTC,* 255 F.2d 295 (8th Cir. 1958).

findings are therefore conclusive and binding upon this Court.

The petitioner also alleges that the hearing examiner erred in not recalling certain witnesses to the stand after it was learned that they had been shown investigative reports prior to testifying. However, both the Commission and the hearing examiner indicated that little, if any, weight was given to the testimony of these witnesses and that their conclusions were reached primarily from the testimony of other witnesses. This being so, the Court finds that the petitioner was not prejudiced by the examiner's failure to recall these witnesses.[7]

The petitioner further contends that the Commission erred by entering an order which exceeds its statutory authority. It is well established that the Commission has a wide discretion in determining the type of order that is necessary to cope with unfair or deceptive practices. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965) The Courts should not interfere with an order of the Commission unless the remedy selected does not have a reasonable relation to the unlawful practices which have been found. *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957). The order involved herein is clearly an attempt to prevent the petitioner from engaging in business activi-

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[7] The petitioner has made the broad allegation that all the witnesses were improperly coached. There has been nothing presented to the Court to substantiate that claim. In a similar manner, the petitioner has asserted that the hearing examiner erred in not allowing a letter from the Better Business Bureau of Memphis to be introduced into evidence. The letter has not been included in the Record and the petitioner has not even attempted to explain why the exclusion of the letter resulted in prejudice to him. On the basis of this Record, there is no need to discuss these questions further. They will be considered as having been waived. See 8th Cir. R. 10(d); *Pellerin Laundry Machinery Sales Co.* v. *Reed*, 300 F.2d 305, 314-15 (8th Cir. 1962); *Loughran* v. *FTC*, 143 F.2d 431, 433 (8th Cir. 1944).

ties which were determined to be unlawful.[8] It is reasonably related to the prevention of those activities. In addition, the Commissioner's modification of the hearing examiner's proposed order was justified by the Record. The modification was merely an attempt by the Commission to

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[8] The Order entered by the Federal Trade Commission is as follows:

It Is Ordered that the following order be, and it hereby is, substituted for the order contained in the initial decision:

It Is Ordered that respondent, John A. Guziak, individually or through any agent, representative, agency or other instrumentality, in connection with the offering for sale, sale or distribution of aluminum and simulated stone home and building siding materials or any other similar products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

(1) Any saving or discount is afforded purchasers or a special or reduced price is granted by respondent, unless such saving, discount or special price constitutes a reduction from the price which respondent usually and regularly charged for the materials and their application in the recent regular course of his business.

(2) (a) Respondent will bring prospective customers to see the purchasers "model home"; or that respondent will call on prospective purchasers referred to him by his customers.

(b) Respondent will pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building.

(3) Respondent manufactures the siding products which he sells.

(4) Aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser, or Reynolds Aluminum Company or misrepresenting in any way the identity of the manufacturer or the source of any of respondent's products.

(5) Respondent is connected or affiliated with Reynolds Aluminum Company, or that respondent is connected with any

remove any doubt as to the specific activities which were being enjoined in connection with petitioner's "bonus" plan.[9] In view of the evidence and findings, there is no basis for petitioner's contention that the Commission exceeded its statutory authority in entering the order involved herein.

The order of the Federal Trade Commission is affirmed. An order will be entered by this Court enforcing it pursuant to the provisions of 15 U.S.C. § 45(c) (1964).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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business concern or organization with which respondent is not so connected or affiliated.

(6) Respondent's products are applied by factory trained personnel.

(7) Respondent's products are unconditionally guaranteed when there are any conditions or limitations to such guarantee.

(8) Using the word "Lifetime" or any other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration of a guarantee.

(9) Any of the respondent's products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It Is Further Ordered that the initial decision and order, as modified, be, and hereby are, adopted as the decision and order of the Commission.

It Is Further Ordered that respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist.

[9] Paragraph 2 of the initial decision (the hearing examiner's proposed order) consisted of 2(b) above. Paragraph 2(a) was added by the Commission. See n. 8, *supra*.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 18128

JOHN A. GUZIAK, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

Final Decree Affirming and Enforcing Order To Cease and Desist

This matter having come on to be heard on March 2, 1966, upon the petition for review of an order of the Federal Trade Commission issued on June 28, 1965, the record certified to the Court by the Federal Trade Commission, briefs and oral argument, and the Court having fully considered the matter and having rendered its decision on June 8, 1966, affirming the Commission's order to cease and desist and directing that it be enforced;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order to cease and desist of the Federal Trade Commission be, and it hereby is, enforced, and that the petitioner be, and hereby is, commanded to obey the said order and to comply therewith.

Entered: June 24, 1966.